

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF THE
REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN:

THE HONOURABLE THE CHIEF JUSTICE OF TRINIDAD AND TOBAGO
MR. JUSTICE IVOR ARCHIE O.R.T.T.

Appellant

-V-

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Respondent

APPELLANT'S CASE

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***References to the Record of Proceedings are in the format [R/Volume No.
/Electronic Bundle Page Number /Paragraph or Line Number where available]***

Introduction

- [1]** This appeal raises issues of Judicial Accountability and Judicial Independence and the proper and Constitutional mechanisms for ensuring both.
- [2]** The appeal concerns the constitutional propriety and legality of the Law Association of Trinidad and Tobago (“**the LATT**”)’s purported investigation into the alleged conduct of the Chief Justice.

- [3] The appeal arose out of the Chief Justice's claim for judicial review of the LATT's decision dated 23 February 2018¹ to continue to take further steps to further an enquiry and/or an investigation to ascertain and/or substantiate allegations made against the Chief Justice and/or its refusal to take no further steps in pursuit of that purported investigation.
- [4] In summary the Chief Justice's case is that the LATT's purported investigation, by way of a committee of senior and junior attorneys, is an unlawful and unconstitutional usurpation and infringement of section 137 of the Constitution and is contrary to and ultra vires the Legal Profession Act ("the LPA").
- [5] The case for the Chief Justice is that the Constitution:
- a) provides the sole and exclusive machinery for the appointment² and removal³ of a judge of the Supreme⁴ Court;
 - b) identifies the persons⁵ who have authority to conduct investigations into the conduct of the Chief Justice; including who determines the facts and makes recommendations⁶ in relation to allegations made against the Chief Justice; and who determines whether those facts warrant consideration of his removal;⁷
 - c) prescribes when⁸ and by what process⁹ such an investigation and/or determination may take place;
 - d) entrusts the process of investigation¹⁰ and consideration¹¹ to Judges; and

¹ R 1/81-85

² Sections 104 and 105 of the Constitution

³ Sections 137 of the Constitution

⁴ Sections 99 to 101 of the Constitution

⁵ A tribunal under section 137 (3) of the Constitution

⁶ Section 137 (3) (b) of the Constitution

⁷ Section 137(2) and (3) (b)

⁸ Section 137 of the Constitution - upon a representation

⁹ Section 137 (3) (a to (c) of the Constitution

¹⁰ Section 137(3) (a) "...a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdictions in appeals from any such Court"

¹¹ Judicial Committee Act 1833 section 1(1) to (4).

e) necessarily excludes the LATT from conducting or continuing with its investigation into allegations of misconduct against the the Chief Justice.

[6] Further the Chief Justice' case is that LATT's reliance upon section 5 of the LPA:

a) is misconceived as that section does not provide the LATT with any express authority to conduct an investigation into allegations made against the Chief Justice so as to "attempt to ascertain/substantiate the facts"¹² on which allegations are based; to "determine whether they are true or not"¹³; and if they are true, to "hold the Judiciary accountable"¹⁴;

b) nor does section 5 by necessary implication provide the Respondent with authority and therefore the LATT's investigation is *ultra vires* its powers under the Legal Profession Act;

c) insofar as section 5 does purport to grant any such authority to the LATT, it is inconsistent with the Constitution as the supreme law¹⁵ of the land;

d) any legitimate scheme of investigation of alleged misconduct must be subject to the observance of due process and equality before the law, natural justice and procedural fairness consistent with the Constitution and the Common Law of Trinidad and Tobago. Any conclusion to the contrary would be perverse;

e) the LATT's purported investigation of the Chief Justice has been carried out unfairly and contrary to natural justice and is defective in appropriate and effective procedural safeguards by reason of its failure and refusal:

1. to provide the Chief Justice in advance with details of the LATT's procedures for its purported investigation;
2. to provide the Chief Justice with all the material which its Investigating Committee has considered/is considering and

¹² R 2/624

¹³ R 2/ 628

¹⁴ R 2/627

¹⁵ Section 2 of the Constitution.

its demand for a response from the Chief Justice before having provided him with full particulars in writing of the allegations against him, and/or disclosing all relevant documents, and other Material and to provide the Chief Justice with an opportunity to comment on that Material;

3. to provide the Chief Justice with a copy of the Committee's interim and/or final report and to provide the Chief Justice with the opportunity to comment thereon;

f) the test of apparent bias applies to the LATT's purported investigation; and the LATT's investigation is tainted by apparent bias as set out below.

Outline Submissions

[7] In outline, the Chief Justice's submissions are as follows.

[8] As set out in para 6(a) above, the LATT has indicated that the purpose of its investigation is to "ascertain/substantiate the facts" on which the allegations against the Chief Justice are based and to "determine whether they are true or not"; and, if it does conclude that they are true, to "hold the Chief Justice accountable". The LATT then intends to determine "the course of action to be taken, if any".¹⁶ Mendonca CJ (Ag) found that this may include consideration of whether to make a complaint to the Prime Minister, but that that is only one possible outcome¹⁷.

[9] Section 137 of the Constitution provides that the Tribunal established under that section shall:

"enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee", which recommendation is binding.

¹⁶ R 1/87

¹⁷ R 3/1037/45

- [10] Accordingly, it sets out the sole procedure for (1) determining the facts in relation to allegations made against the Chief Justice; and (2) deciding whether those facts warrant consideration of his removal. It is prescriptive as to who shall carry out that task, when, and by what process, as set out in detail in paragraph 5 above. If the framers of the Constitution had intended for any other person to be entitled/required to do so, they would have said so.
- [11] The section does not prohibit anyone from investigating allegations against the Chief Justice as a preliminary step before making a complaint to the Prime Minister. However, they may do so only insofar as is necessary to satisfy themselves that there is a *prima facie* case against the Chief Justice; or, in other words, a proper basis on which the Prime Minister might consider whether to refer the question to the President so as to initiate an investigation under section 137.
- [12] Section 137 does not permit anyone other than the Tribunal duly established under that section to (1) conduct an investigation with the intention of determining whether the relevant allegations are in fact true; or (2) take any further action in relation to those allegations, other than making a complaint to the Prime Minister.
- [13] The LATT intends to do both of these things. As such, it is purporting to carry out precisely the form of investigation, and with the same purpose, which section 137 reserves to the Tribunal. It is not entitled to do so.
- [14] This is not a purely technical point, rather it has serious and significant practical implications. Section 137 ensures that there is a fair and proper procedure for investigating such serious allegations against a judge. By contrast, there is no provision, either in the Constitution or the LPA, setting out the constitution of the LATT committee, the procedure it must follow, or any other requirements for its purported investigation. The LATT is making up the relevant procedures from scratch.
- [15] In those circumstances, there is no guarantee of appropriate and effective procedural safeguards. The LATT has already been deficient in this regard, having demanded a response from the Chief Justice before having set out full

particulars in writing of the allegations against him, or disclosing relevant documents (see para 6(e) above).

- [16] It is also important that justice is seen to be done in this regard. Although the LATT has no power to remove the Chief Justice, the fact of its investigation and the public statements it has made have the potential to mislead the public as to its role. They also give the clear impression that the LATT believes there is some basis for the allegations against the Chief Justice, before the facts have been determined by the appropriate Tribunal. The public must be able see that that determination is being made by the appropriate body, and according to the procedure set out in the Constitution. That will not happen if the LATT proceeds with its investigation.
- [17] The LATT's investigation is therefore prohibited by the Constitution and, insofar as section 5 of the LPA purports to grant it the power to carry out that investigation, it has no effect.
- [18] Further and in any event, section 5 does not even purport to grant such a power. The LATT's proposed course will not further the purposes in that section, and in particular section 5(f), for all the reasons set out above. Its investigation duplicates and thereby undermines the procedure provided for in section 137 of the Constitution; it lacks any or any appropriate procedural safeguards and fails to guarantee fairness or due process; and it has the potential to mislead the public and to undermine public perception of justice being done in accordance with the Constitution. As such, it does not further the administration of justice or the rule of law. It undermines them.
- [19] Finally, the test for apparent bias in *Porter v Magill* applies in all the circumstances. This is because the LATT is purporting to make findings of fact and, based on those findings, to decide whether to take steps which may have a very significant impact on Chief Justice's ability to continue in his office, and therefore on his civil rights and liabilities. Further, there is apparent bias on the part of the LATT, given the following facts:

- (a) Its public comments, made at an early stage in its investigation, that the conduct of the Chief Justice was “unacceptable and incomprehensible” and “nothing short of reckless”;
- (b) Its previous motion of no confidence and call for the Chief Justice to resign;
- (c) The fact of its investigation, conducted outside the ordinary Constitutional procedure set out in section 137, which has the potential to give the impression that it believes the allegations are or may be true.

Facts

- [20]** The facts are set out in the Statement of Facts and Issues and the judgments in the Courts below. They are not disputed and there was no cross-examination.
- [21]** In brief, pursuant to sections 100 to 102 of the Constitution, the President of the Republic (“the President”) appointed the Chief Justice (who is also the President of the Court of Appeal) on 24 January 2008.¹⁸
- [22]** In or around April 2017 a public¹⁹ controversy arose concerning the appointment of former Chief Magistrate Mrs. Marcia Ayers- Caesar to the High Court Bench and her subsequent resignation therefrom.²⁰
- [23]** By letter dated 25 May 2017 the LATT sent to the Chief Justice a list of questions to be considered at its Special²¹ General Meeting.²²
- [24]** By letter dated 31 May 2017, the Chief Justice responded to the questions posed²³ and did not challenge the LATT’s jurisdiction to make those inquiries.²⁴

¹⁸ R 1/12 & 31

¹⁹ R 2/592/24 & 2/654 to 658

²⁰ R 2/592/25 & 2/661- 662

²¹ R 2/593/26 & 2/665- 682

²² R 2/594/28 & 2/687-690

²³ R 2/594/29 & 2/693- 697

²⁴ R 2/594/30

[25] On the 1 June 2017,²⁵ the LATT held its Special General Meeting and called upon the Chief Justice and other members of the Judicial and Legal Service Commission to resign.²⁶

[26] On 19 July 2017 Mrs. Marcia Ayers- Caesar brought judicial review proceedings to challenge her resignation.²⁷

Media Allegations

[27] In summary, over the period November 2017 to January 2018 the Sunday Express newspaper published a series²⁸ of articles (others published articles too) that alleged that the Chief Justice had:

(a) discussed Judges' personal security arrangements with one Dillian Johnson, a personal friend who worked for a security company; and

(b) recommended certain persons for Housing Development Corporation ("HDC") public sector housing and had allowed one Kern Romero to use the Chief Justice's name as a recommender in exchange for money being paid to Mr. Romero.

[28] The LATT publicly²⁹ described the first allegation as "as yet unsubstantiated"; but called on the Chief Justice to address publicly the allegation that the Chief Justice had discussed the security arrangements for judges with a personal friend. Others made public calls³⁰ for the Chief Justice to respond.

[29] On 17 November 2017, the Honourable Justice Carol Gobin wrote to the Chief Justice seeking a judges' meeting and on 21 November 2017 the Chief Justice declined.³¹

²⁵ R 2/594/31-32 & 2/700

²⁶ R 2/700

²⁷ R 3/1150

²⁸ R 1/48; R 2/598, 604, 608-9, 621, 642-644 & 646

²⁹ R 1/41

³⁰ R 2/590/14 & 631-2

³¹ R 2/589/9 & 2/598-599

- [30] On 29 November 2017, the LATT appointed a Committee which it purported was to ascertain/substantiate the facts upon which formed the basis of the allegations made against the Chief Justice, and the next day so informed the Chief Justice in person.³²
- [31] On or about 2 December 2017, a group of the Supreme Court Judges issued a press release³³ in which they denied that, at a general meeting of Court Judges held on 26 July 2017, a security company was mentioned or referred to; and said that the Chief Justice did not seek to convince his fellow judges to change or alter their personal security arrangements.
- [32] On 14 December 2017,³⁴ the LATT publicly criticised the Chief Justice for his failure to respond to the allegations as potentially damaging to his office and to the Judiciary, and described his continued silence as “nothing short of reckless”.
- [33] The LATT publicly reiterated its resolve to ascertain/substantiate the facts upon which the allegations against the Chief Justice were based with a view to determining what, if any, further action might be appropriate, and cited section 5 of the LPA as its mandate.

Chief Justice’s Responses

- [34] By a press release dated 15 December 2016, the Chief Justice publicly:
- (a) stated that it was “false and indeed irresponsible to suggest that at any judges’ meeting the Chief Justice or any other judge discussed the retention of any private security firm for the purpose of providing the said personal security”;
 - (b) stated that in 2015, he forwarded the names of “needy and deserving persons” to the HDC;

³² R 2/624-8

³³ R 2/447/4(b) & 2/455-458

³⁴ R 1/33/10(b) & 40-41

(c) denied that he had ever recommended Mr. Dillian Johnson for HDC housing; and

(d) described the allegations as patently untrue, suggesting that those saying otherwise were engaging in “purposeful mischief making”³⁵.

[35] Over the period from mid-December³⁶ 2017 to early January 2018³⁷ the LATT’s President updated the media about its purported investigation, but did not write to the Chief Justice.

[36] By pre-action letters dated 5 & 8 January 2018 the Chief Justice’s Attorneys wrote to the Express newspapers and Guardian Media in respect of the articles published over the period 12 November 2017 to 4 January 2018, and in respect of the fraudulent images used in articles and broadcasts.³⁸

Correspondence between the LATT and Chief Justice

[37] By letter dated 20 January 2018 the LATT wrote to the Chief Justice stating that:

(a) it had embarked upon its purported investigation;

(b) it proposed to seek advice from Dr. Francis Alexis QC and Mr. Eamon Courtenay SC;

(c) it proposed to submit its report to the LATT in a General Meeting; and

(d) the Chief Justice was invited to respond to the two detailed allegations.³⁹

[38] At paragraph 22⁴⁰ of his affidavit the Chief Justice complains that the LATT’s letter dated 20 January 2018 did not disclose the process or procedures that had

³⁵ R 2/637

³⁶ R 1/34/10(e), (f) & 50, 52

³⁷ R 1/34/10(g), (h) & (i) & 54, 56

³⁸ R 2/468 to 544

³⁹ R 1/35/11 & 1/58 to 60

⁴⁰ R 1/25/22 & 1/58 to 60

been adopted by the Committee, nor did it disclose any reports to him. The LATT does not dispute this.

- [39] By letter dated January 30 2018, the Chief Justice's Attorneys-at-Law wrote to the LATT and disputed its jurisdiction, and/or power to hold the Chief Justice and/or the Judiciary accountable and/or to determine whether allegations made were true or not in relation to the question of the Chief Justice's removal from office.⁴¹
- [40] By letter dated 31 January 2018, the Chief Justice's Attorneys-at-Law requested from the LATT copies of documents, photographs and WhatsApp messages.⁴²
- [41] By letter dated 6 February 2018, the LATT sent to the Chief Justice's Attorneys-at-Law enclosing copies of WhatsApp messages, photographs, emails and photographs and a composite statement ("the Material").⁴³
- [42] By letter dated 14 February 2018 the Chief Justice's Attorneys-at-Law complained to the LATT of the non-disclosure of the Material withheld since 20 January 2018 at least.⁴⁴
- [43] By letter dated 15 February 2018 the LATT replied to the Chief Justice's Attorneys-at-Law holding to its position as stated in its letter dated 20 January 2018.⁴⁵
- [44] On 20 February 2018 the President of the LATT emailed John Jeremie SC, one of the Attorneys-at-Law acting for the Chief Justice, informing him that the LATT would shortly be sending a brief to its legal advisors and that the Chief Justice's response should therefore be provided by 22 February 2018 if he wished to have the legal advisors consider the same.⁴⁶
- [45] By a pre-action protocol letter dated 21 February 2018, the Chief Justice's Attorneys-at-Law wrote to the LATT and asked the LATT to take no steps to

⁴¹ R 1/35/13 & 1/62 to 64

⁴² R 1/36/14 & 1/66 to 67

⁴³ R 1/36/15 & 1/69 to 70 & 2/512 & 545 to 585

⁴⁴ R 1/36/16 & 1/72

⁴⁵ R 1/36/17 & 1/74

⁴⁶ R 2/653

further its purported enquiry and/or investigation until the Court had pronounced upon its legal and constitutional propriety.⁴⁷

[46] By letter dated 23 February 2018, in response to the pre-action protocol letter, the LATT's Attorneys-at-Law rejected the suggestion that its investigation and examination of the Chief Justice's conduct was without authority or otherwise improper.⁴⁸

[47] By a Notice dated 26 February 2018, the LATT advised its membership of a Special General Meeting to take place on 15 March 2018 to consider the report of the Committee appointed to ascertain/substantiate the allegations and the advice of Dr. Francis Alexis QC and Mr. Eamon Courtenay SC and to direct the Council as to the course of action to be taken, if any.⁴⁹

Chronology of Proceedings & Orders in the Courts Below

[48] On 27 February 2018 the Chief Justice filed for Judicial Review⁵⁰ of the LATT decision dated 23 February 2018 to continue to take further steps to further its investigation to ascertain and/or substantiate allegations made against him.

[49] The application for leave came on for hearing that afternoon before the Honourable Madame Justice Nadia Kangaloo who, with the parties' consent, gave directions for evidence⁵¹ and for the matter to be heard as a 'rolled up' hearing.

[50] On 2 March, 2018 Kangaloo J heard⁵² the Application for Judicial Review. On 6 March 2018, she delivered her judgment granting the relief sought and, in light of her further oral reasons, published a revised Written Judgment ("the Judgment") on March 8 2018⁵³ which included her supplemental oral reasons.

⁴⁷ R 1/37/18 & 1/76 to 79

⁴⁸ R 1/37/19 & 1/81 to 85

⁴⁹ R 1/37/20 & 1/87

⁵⁰ R 1/12 to 90

⁵¹ The Respondent affidavit evidence was originally filed on 1 March 2018 (not in the Record) and the Appellant replied thereto on 2 March 2018. The Respondent affidavit filed on 5 March 2018 has identical terms to that filed on 1 March 2018.

⁵² R 1/164 to 444

⁵³ R 2/732 to 755

[51] In the Judgment, Kangaloo J found, correctly it is submitted, that:

- i. The LATT by its conduct of its investigation by the appointment of the Committee with the President of the LATT being the President of that Committee, in the role of the President of that Committee in liaising with the Press and in corresponding with the HDC and in all other matters including the issue of press releases, sought to shadow the procedure which is set out under section 137 of the Constitution (See paragraph 31 of the Judgment).⁵⁴
- ii. The LATT is attempting by its enquiry and/or investigation which may be potentially sent to the Prime Minister as being conducted with a view to change the Prime Minister's mind. The Prime Minister has already made his position clear. (See paragraph 32 of the Judgment).⁵⁵
- iii. What is clearly absent from the Privy Council judgment in **Meerabux** is however any reference to any investigation conducted by the Belize Bar Association prior to the delivery of the complaint and subsequent to the Executive indicating that it would not get involved in the matter. Further, in the **Meerabux** case, it was clear that any role for the Bar Association was envisioned to take place at the tribunal stage, when witnesses were called and cross-examined and the Chief Justice fully participated (see paragraph 33 of the Judgment).⁵⁶
- iv. As a matter of law that the removal of judges and the Chief Justice is enshrined, dictated and provided for solely under the Constitution for this very reason, to ensure procedural fairness to judges and the Chief Justice who enjoy security of tenure thereunder. (See paragraphs 34 & 35 of the Judgment).⁵⁷
- i. There is no complaint with the power of the LATT as mandated under Rule 36(1)(4) of the Code of Ethics Part A, that the LATT, like any citizen of this country, may make a complaint about a Judge or the Chief Justice. What cannot be permitted on a conjoint reading of section 5(f) and Rule 36(1)(4) or

⁵⁴ R 2/749

⁵⁵ R 2/749

⁵⁶ R 2/750

⁵⁷ R 2/750

even these parts of the LPA separately does not empower in any way or authorise the LATT to conduct an investigation into misbehaviour of the Chief Justice in any terms. The sole procedure for so doing is to be found in the Constitution. (See paragraph 36 of the Judgment).⁵⁸

- ii. There was no apparent bias in the instant case on the part of the LATT which would stem from those resolutions nor from the conduct of the LATT as a body to date. The ordinary fair-minded observer being informed of all of the facts and sitting in Woodford Square, Harris Promenade or in Shaw Park would not consider that in all of the circumstances of this case the body or the entity which is the LATT can be found wanting in terms of bias and is therefore not guilty of apparent bias⁵⁹ and while she made no express finding in respect of the Appellant's claim of unfairness and bad faith, must be taken to have rejected them. (See paragraph 37 of the Judgment).⁶⁰
- iii. Accordingly, the LATT had acted outwith its authority under the LPA in commencing and continuing its enquiry and/or investigation into the allegations against the Chief Justice.
- iv. Kangaloo J therefore granted a declaration that the said decision was illegal and/or ultra vires and/or unreasonable and/or irrational and/or contrary to the provisions of the LPA and is null and void and of no effect; an order of certiorari to remove into the Honourable Court. (See paragraph 38 of the Judgment).⁶¹

Court of Appeal

[52] By Notices of Appeal filed on 7 & 8 March 2018⁶² (the former subsequently amended) the LATT appealed the findings against its investigation, and the Chief Justice cross appealed the findings against apparent bias, bad faith and natural justice.

⁵⁸ R 2/750

⁵⁹ R 2/751/37

⁶⁰ R 2/751

⁶¹ R 2/752

⁶² R 2/766-770

[53] On 10 April 2018 the Court of Appeal (Mendonca, CJ (Ag.), Jamadar & Breaux JJ.A) heard the appeals.⁶³

[54] By three judgments dated 22 May 2018 the Court of Appeal, (Mendonca,⁶⁴ CJ (Ag.), Jamadar J.A⁶⁵ & Breaux J.A⁶⁶ each of whom gave differing grounds) allowed the LATT's appeal and dismissed the Chief Justice's cross appeal.

[55] In summary the Court of Appeal found, incorrectly, it is submitted, that:

(a) section 137 of the Constitution did not proscribe the LATT from enquiring into or investigating the conduct of the Appellant;⁶⁷

(b) that section 5 of the Legal Profession Act permitted the LATT's investigation;⁶⁸

(c) that the test of apparent bias was inapplicable to a case of this nature and that, if it did apply, no case of apparent bias was made out;⁶⁹

(d) that the allegation of bad faith on the part of the LATT was not made out;⁷⁰ and

(e) the Chief Justice has not been treated unfairly by the LATT.⁷¹

⁶³ R 3/911 to 1011

⁶⁴ R 3/1012 to 11079

⁶⁵ R 3/1117 to 1181

⁶⁶ R 3/1080 to 1116

⁶⁷ Mendonca JA R 3/1041-58/54-87 & Breaux JA R 3/1092 -1100/21-33, Jamadar JA R 3/1137-1149/40-72

⁶⁸ Mendonca JA R 3/1035-41/41-54 & R 3/1058/87 & Breaux JA R3/1104/40& Jamadar JA R 3/1124/13, R 3/1129/26 and R 3/1132/32, R 3/1134/35

⁶⁹ Mendonca JA R 3/1057-64/88-114 & Breaux JA R 3/1109-12/48-56 & Jamadar JA R 3/1150-8/78-93

⁷⁰ Mendonca JA R 3/1077-8/126-9 & Breaux JA R 3/1113-16/59-65 & Jamdar JA R 3/1161-2/99-102

⁷¹ Mendonca JA R 3/1073-7 & 1078/ 119-125 &129 & Breaux JA R 3/1115-6/63-64 & Jamadar JA R 3/1159-61/94-98

Judicial Independence; Judicial Appointment & Judicial Removal

[56] The Chief Justice identifies select provisions of the Constitution that concern judges and the judiciary.

[57] **Section 2** of the **Constitution** provides:

This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.

[58] This provision was new to the 1976 Republican Constitution and has no parallel in the 1962 Independence Constitution.

[59] **Sections 99 to 101** of the **Constitution** provide as follows:

99. There shall be a Supreme Court of Judicature for Trinidad and Tobago consisting of a High Court of Justice (hereinafter referred to as "the High Court") and a Court of Appeal with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law.

100. (1) The Judges of the High Court shall be the Chief Justice, who shall be ex officio a Judge of that Court, and such number of Puisne Judges as may be prescribed. (2) The High Court shall be a superior Court of record and, save as otherwise provided by Parliament, shall have all the powers of such a Court, including all such powers as are vested in the Supreme Court of Trinidad and Tobago immediately before the commencement of this Constitution.

THE COURT OF APPEAL

101. (1) The Judges of the Court of Appeal shall be the Chief Justice, who shall be the President of the Court of Appeal, and such number of Justices of Appeal as may be prescribed. (2) The Court of Appeal shall be a superior Court of record and, save as otherwise provided by Parliament, shall have all the powers of such a Court.

[60] Prior to the Republican Constitution, section 73 of the 1962 Independence Constitution and section 4 of the Supreme Court of Judicature Act established the Supreme Court of Judicature consisting of the High Court and the Court of Appeal. Section 99 of the (1976 Republican) Constitution replaces section 73 of the 1962 Constitution.

[61] **Section 104 (1)** of the **Constitution** provides as follows:

104. (1) The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.

Security of Judicial Tenure

[62] **Section 106** of the **Constitution** provides:

106. (1) Subject to section 104(3), a Judge shall hold office in accordance with sections 136 and 137. (2) No office of Judge shall be abolished while there is a substantive holder of that office.

[63] **Section 110 (1) & (2)** of the **Constitution** provides as follows:

110. (1) There shall be a Judicial and Legal Service Commission for Trinidad and Tobago. (2) The members of the Judicial and Legal Service Commission shall be— (a) the Chief Justice, who shall be Chairman; (b) the Chairman of the Public Service Commission; (c) such other members (hereinafter called “the appointed members”) as may be appointed in accordance with subsection (3).

[64] Section 110⁷² of the (1976 Republican) Constitution replaces section 83 of the 1962 Constitution.

[65] **Section 136 (1) to (6) and (13)** of the **Constitution** provide:

136. (1) The holder of an office to which this subsection and subsections (3) to (11) apply (in this section referred to as “the officer”) shall vacate his office on attaining the age of sixty-five years or such other age as may be prescribed.

(2) Notwithstanding that he has attained the age at which he is required by or under subsection (1) to vacate his office, a Judge may, with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(3) Nothing done by the officer shall be invalid by reason only that he has attained the age at which he is required under this section to vacate his office.

⁷² R 1/14 & 31

(4) The officer shall vacate his office if, with his consent, he is appointed a Senator or nominated for election to the House of Representatives.

(5) The salaries and allowances payable to the holders of the offices to which subsection (1) and subsections (3) to (11) apply or an office referred to in subsections (13) to (16) shall be a charge on the Consolidated Fund.

(6) The salary and allowances payable to the holder of any office to which subsection (1) and subsections (3) to (11) apply or an office referred to in subsections (13) to (16) and his other terms of service shall not be altered to his disadvantage after his appointment and for the purposes of this subsection, in so far as the terms of service of any person depend upon the option of that person, the terms for which he opts shall be taken to be more advantageous to him than any other terms for which he might have opted.

(7) – (12)....

(13) Subsections (1) to (6) apply to the office of Judge.

Removal of Judges

[66] Section 137 of the Constitution provides:

137. (1) A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.

(3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a Judge other than the Chief Justice, represents to the President that the question of removing a Judge under this section ought to be investigated, then—

(a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the President acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, from among persons who hold or have held office as a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeals from any such Court;

- (b) *the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee; and*
- (c) *where the tribunal so recommends, the President shall refer the question accordingly.*

Entrenched Provisions

[67] Section 54 (1) of the **Constitution** provides:

54. (1) Subject to the provisions of this section, Parliament may alter any of the provisions of this Constitution or (in so far as it forms part of the law of Trinidad and Tobago) any of the provisions of the Trinidad and Tobago Independence Act 1962.

(2) In so far as it alters—

(a) sections 4 to 14, 20(b), 21, 43(1), 53, 58, 67(2), 70, 83, 101 to 108, 110, 113, 116 to 125 and 133 to 137; or

(b) section 3 in its application to any of the provisions of this Constitution specified in paragraph (a),

a Bill for an Act under this section shall not be passed by Parliament

[68] These provisions:

- a) provide for Judicial Independence in a distinct part of the Constitution;
- b) are in a distinct section of the Constitution that reflects the doctrine of the separation of powers;
- c) provide for Judicial appointment by an independent commission;
- d) establish security of tenure of judicial office from legislative and executive intrusion; and
- e) provide for judicial accountability and removal by judges who investigate and recommend removal.

- [69] These provisions were considered by the Board in ***Surratt v Attorney General of Trinidad and Tobago*** [2007] UKPC 55; [2008] 1 AC 655 – paras 12, 13, 38 & 40.
- [70] The Constitution does not provide for any of the detailed procedures analagous to those under the Constitutional Reform Act 2005, sections 108 to 115; or the Judiciary and Courts (Scotland) Act 2008 sections 28 to 39 and the respective procedures.⁷³
- [71] Similar legislation exists in other parts of the Commonwealth such as Canada's Judges Act 1971 sections 58 to 71 (and see procedures made thereunder);⁷⁴ New South Wales Judicial Officers Act 1986 sections 13 to 43; and New Zealand's Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Legal Profession

- [72] The Chief Justice's case is that Parliament did not contemplate nor provide for the legal profession to have a formal role in the investigation of allegations against Judges in Trinidad and Tobago.
- [73] In 1986 Parliament passed the Legal Profession Act ("the LPA") for the purpose of reorganising (fusing⁷⁵) and regulating the legal profession, and providing for qualification and enrolment into the profession and the discipline of its members.
- [74] Section 1 records that the LPA was passed by a special majority as inconsistent with the fundamental rights and provisions of sections 4 & 5 of the Constitution, as every practising attorney is a member⁷⁶ of the LATT.
- [75] By section 3 of the LPA, the LATT is a body corporate and by section 4 its affairs are managed by an elected Council.

⁷³ Eg. The Judicial Conduct (Judicial and other office holders) Rules 2014 & The Judicial Discipline (Prescribed Procedures) Regulations 2014

⁷⁴ Canadian Judicial Council Inquiries and Investigations By-laws, 2015

⁷⁵ See the definition of practice law means practice as a barrister or solicitor or an Attorney at law and section 14 of the LPA. In the English Speaking Caribbean there are no barristers not solicitors all are admitted as attorneys eg Barbados legal Profession Act Ch 370

⁷⁶ Section 6 of the LPA

[76] By section 5 the LATT's purposes are:

- a. to maintain and improve the standards of conduct and proficiency of the legal profession in Trinidad and Tobago*
- b. to represent and protect the interests of the legal profession in Trinidad and Tobago;*
- c. to protect and assist the public in Trinidad and Tobago in all matters relating to the law;*
- d. to promote good relations within the profession, between the profession and persons concerned in the administration of justice in Trinidad and Tobago and between the profession and the public generally;*
- e. to promote, maintain and support the administration of justice and the rule of law;*
- f. to do such other things as are incidental or conducive to the achievement of the purposes set out at (a) to (f)."*

[77] In furtherance of its purposes the LPA makes provision for:

- a) LATT membership – enrolment, admission and status – sections 13 to 25;
- b) removal from the roll and suspension –sections 28 to 30;
- c) professional practice and conduct including accounts and discipline— section 33 to 35;
- d) the establishment of a disciplinary committee⁷⁷ appointed by the Chief Justice after consultation with the LATT's Council to hear complaints- section 37 to 42; and
- e) A compensation fund for losses due to dishonesty or breach of trust or hardship - section 54 to 59.

[78] Specifically, it is the High Court that regulates the admission of all attorneys at law to practise.

⁷⁷ Section 36 and the Fourth Schedule of the LPA which provides for the constitution of the Disciplinary Committee

[79] Section 15 of the LPA:

15. (1) Subject to this Act a person who makes application to the High Court and satisfies the Court that he—

(a) is a Commonwealth citizen or a Caricom national;

(b) is of good character, and either

(c) holds the qualifications prescribed by law, or

(d) is a person in respect of whom an Order has been made under section 15A,

shall be eligible to be admitted by the Court to practise as an Attorney-at-Law in Trinidad and Tobago.

[80] The ordinary discipline of attorneys, short of removal from the roll, is dealt with by a Disciplinary Committee, appointed by the Chief Justice,⁷⁸ administering a Code of Ethics that the Council may amend with the approval of the Chief Justice.

[81] Thus sections 35 and 36 of the LPA provide:

Discipline

35. (1) The rules contained in the Code of Ethics set out in the Third Schedule shall regulate the professional practice, etiquette, conduct and discipline of Attorneys-at-law.

(2) A breach of the rules in Part A may constitute professional misconduct and in Part B shall constitute professional misconduct.

(3) Where no provision is made by the rules in respect of any matter, the rules and practice of the legal profession which before the commencement of this Act govern the particular matter shall apply in so far as is practicable.

(4) The Council with the approval of the Chief Justice may amend the Third Schedule.

Disciplinary Committee and Proceedings

⁷⁸ Fourth Schedule

36. (1) *A Disciplinary Committee (hereinafter referred to as “the Committee”) is established for the purpose of dealing with complaints against Attorneys-at-law.*

(2) *The Registrar, or where he so deputizes a Deputy Registrar or an Assistant Registrar, shall perform the duties of Secretary to the Committee.*

(3) *The provisions of the Fourth Schedule shall have effect in relation to the constitution of the Committee and other matters relating to it.*

(4) *Expenses incurred by the Committee in the discharge of its functions shall be met from the Compensation Fund.*

[82] By section 38 (2) of the LPA:

2) For the purposes of any application made to it under this Act, the Committee shall have the powers of the High Court to summon witnesses, call for the production of books and documents and examine witnesses and parties concerned on oath.

[83] The Chief Justice appoints the Disciplinary Committee. The Fourth Schedule provides:

Fourth Schedule

Disciplinary Committee

1. (1) The Disciplinary Committee shall consist of the President of the Association and fifteen other persons appointed by the Chief Justice after consultation with the Council.

(2) The appointed members shall include three members of the Council.

(3) Subject to subparagraph (4) the other appointed members shall be Attorneys-at-law of not less than ten years standing.

(4) The Chairman and Vice-Chairman of the Committee shall be appointed by the Chief Justice after consultation with the Council and shall be members who have held high judicial office or, are Attorneys-at-law of not less than ten years standing.

[84] The Disciplinary Committee may fine or reprimand but it may not remove from the roll.

[85] Sections 39 (1) & (3) & 41 of the LPA provide:

39. (1) On the hearing of an application under this Part, the Committee may—

(a) dismiss the application;

(b) impose on the Attorney-at-law to whom the application relates, such fine as it thinks proper; or

(c) reprimand the Attorney-at-law to whom the application relates; and

(d) make such order as to costs as it thinks fit, and in addition, except where the application is dismissed, the Committee may order the Attorney-at-law to pay the applicant or person aggrieved such sum by way of compensation and reimbursement and such further sum in respect of expenses incidental to the hearing of the application and the consideration of the report as it thinks fit.

(2)

(3) Where the Committee is of the opinion that a case has been made out which justifies punishment more severe than may be imposed by it under this section such as suspension from practice or removal from the Roll, the Committee shall forward to the Chief Justice and to the Attorney general a copy of the proceedings before it and its findings thereon.

41. (1) Without prejudice to any other rule of law or to any rule of practice whereby the Supreme Court is empowered to take disciplinary action against a person admitted to practise as an Attorney-at-law before it, it is hereby declared that the High Court has the power to take disciplinary action in accordance with Rules of Court made for the purpose under section 78(1)(l) of the Supreme Court of Judicature Act with respect to his professional conduct against an Attorney-at-law and in particular the High Court may make any one or more of the following orders, namely:

(a) an order removing from the Roll the name of the Attorney-at-law against whom disciplinary proceedings have been instituted;

(b) an order suspending the Attorney-at-law from practice for such time as the High Court deems fit;

(c) such order as to costs, as regards both the proceedings before it and the proceedings before the Disciplinary Committee as the High Court deems fit;

(d) such further or other order as the circumstances of the case may require.

(2) In the exercise of the powers under subsection (1) the High Court shall sit as a full Court consisting of three Judges.

(3) The Attorney-at-law whose professional conduct is the subject of any disciplinary proceedings before the High Court shall be entitled as of right to appeal to the Court of Appeal from any decision or other determination of the High Court in such proceedings.

[86] Thus, removal from the Roll is a matter for the Court.

[87] The Chief Justice submits that there are no express nor detailed provisions nor safeguards in the LPA that support the assertion that the LATT has a legislatively mandated role in the investigating of allegations against the Chief Justice.

[88] By contrast the LPA provides a detailed code for the appointment of the body to hear and investigate complaints against attorneys, and the process for removal from the Roll and appeals from those determinations.

Independence of the Judiciary

[89] The Chief Justice says that it is common ground that section 137 (3) of the Constitution provides that:

a) as a precursor to a representation under section 137 of the Constitution the Prime Minister must be satisfied that complaints have a prima facie basis in fact; and

b) once a representation has been made it is for the Tribunal to investigate the facts to determine their truth or not.

[90] The Chief Justice submits that section 137 of the Constitution is the sole basis for investigating the conduct of the Chief Justice in order to decide whether he should be removed or not removed. Thus, investigation is connected to and inseparable from removal.

[91] In that light, section 137 prescribes that only the Tribunal of superior court judges shall determine the facts in relation to allegations made against the Chief Justice and make a recommendation as to whether the Lordships' Board consider whether those facts as found or as properly found warrant consideration of his removal.

- [92]** As foreshadowed in its Issues the LATT will likely dispute this conclusion in its Written Case and argue for a role for a potential 137 complainant as investigator. The Chief Justice says that such a conclusion undermines the careful scheme for ensuring accountability and effectively amounts to legislative amendment of that scheme on the basis that the LATT has the right or even duty to determine the truth of the allegations against the Chief Justice. On the LATT's case the Tribunal, should the LATT say the allegations are true, will also investigate the allegations to determine if they are true all over again.
- [93]** The Chief Justice says that the Court of Appeal went wrong in its reasoning in seeking to construe section 5 of the LPA on its own without regard to the Constitutional provisions and without regard to its own context. (The Chief Justice will develop his submission below that section 5 (b), (e) & (g) – and the references to the promotion of the rule of law and the administration of justice - are too slender a basis to sustain the conclusion argued for by the LATT.)
- [94]** The Chief Justice submits further that sections of the Constitution set out at paragraphs 44 to 54 above provide the interpretive context for construing the LPA in general, and section 5 in particular.
- [95]** In failing to construe section 5 of the LPA in light of all the Constitutional provisions that deal with judges, the Chief Justice says that the Court of Appeal - Mendonca CJ (Ag), Jamadar & Bereaux JJA) went wrong.
- [96]** Mendonca CJ (Ag) at para 55 - 59⁷⁹ correctly observed that the constitutional provisions as to the appointment of judges and the exclusive procedure as to their removal, all ensure judicial independence.
- [97]** However, the Chief Justice says that Mendonca CJ (Ag) respectfully asked himself a circular question when he said – at para 56 – that the question in this appeal was whether these provisions of the Constitution proscribe the conduct of the LATT, which by the LPA it is authorised to do.

⁷⁹ R 3/1042- 4

- [98] Next Mendonca CJ (Ag) reasoned that since section 137 does not refer to the conduct of a potential complainant who may wish to investigate another's allegations against the Chief Justice in order to determine whether to make a complaint, then literally the conduct is not prohibited. The Chief Justice says that Mendonca CJ (Ag)'s reasoning from absence is flawed.
- [99] The reasoning is defective in adhering to a literal interpretation as Mendonca CJ (Ag) does not reflect contextual contemporary adjudication and is not aligned to the approach illustrated by Lady Hale in ***Surratt v Attorney General of Trinidad and Tobago*** [2008] AC 655 when she repeated the observation at para 45 that: "... the Constitution itself must be given a broad and purposive construction: see ***Minister of Home Affairs v Fisher***⁸⁰ ..."
- [100] Thus the Chief Justice says that Mendonca CJ (Ag) did not go far enough in articulating the implications of the Constitutional provisions for security of tenure and judicial independence.
- [101] Had Mendonca CJ (Ag) done so, he would have considered whether Parliament in passing the LPA were intending to amend the Constitutional provisions that touch judicial independence and judicial removal. This he did not.
- [102] Further Mendonca CJ (Ag) failed to recognise the respective roles of the potential complainant, the Prime Minister and Tribunal in the section 137 scheme. Had he not done so he would have recognised that a coherent scheme of judicial accountability consistent with judicial independence could not start with an investigation by or on behalf of the complainant to ascertain and/or to substantiate the facts or to determine whether they are true.
- [103] Mendonca CJ (Ag) failed to recognise that to conclude as he did blurred the respective roles of the Prime Minister and the Tribunal and emptied them of any meaning. In so doing Mendonca failed to construe meaningfully section 137 and the other provisions of the Constitution.

⁸⁰ Lord Wilberforce in ***Minister of Home Affairs v- Fisher*** [1980] AC 319, 328G "the austerity of tabulated legalism".

[104] Mendonca CJ (Ag) considered at paras 67 to 72⁸¹ that the Board's decision in **Rees v Crane** [1994] 2 AC 173 took the matter no further on the analysis of section 137 of the Constitution. The Chief Justice says that his contentions are consistent with the analysis of Lord Slynn for the Board. Lord Slynn observed from pages 183 onwards that there are distinct processes for appointment and removal of the Chief Justice and that the latter is provided for by way of a distinct code in section 137 in several stages (three or four if the initiating stage is included – page 189D to E); and in respect of each stage or tier of the process section 137 is silent as to the procedure to be followed (page 192). The Chief Justice says the fact the LATT is conducting an investigation into the truth of the allegations against the Chief Justice is relevant *ipso facto* and not dependant on the outcome of that investigation of either support for the Chief Justice or complaint. There is no basis for public confidence in a private investigation by the LATT that vindicates the Chief Justice; the suspicion will not not be dissipated.

[105] As for Jamadar JA, he correctly invoked at paras 8 to 11⁸² a broad and purposive approach. He noted at paras 44 & 61⁸³ that section 137 of the Constitution is the only means for removing or suspending a Judge; and at para 61 that section 137 of the Constitution ensures the independence of the Judiciary and is entrenched for the purpose.

[106] It is submitted that Jamadar JA attributed⁸⁴ to the Chief Justice an argument that any and all investigations of the Chief Justice outwith section 137 are prohibited, which is an argument that he did not make. The Chief Justice's argument is that any investigation into the truth of the allegations for the purpose of determining the truth of the allegations against him as purported to be done by the LATT is a matter for the Tribunal.

[107] As for **Rees v Crane** Jamadar JA relies upon this case at para 48 to 56⁸⁵ to support his reasoning that in order for the Commission to have been satisfied that the complaint had a prima facie sufficient basis in fact and was sufficiently serious

⁸¹ R 3/1147-49

⁸² R 3/1121-3

⁸³ R 3/1138-39 & 1144-5

⁸⁴ R 3/1139 & 1141

⁸⁵ R 3/1139 to 1144

to warrant representation to the President (page 192 C to D), what must have been contemplated was an investigation (para 48). The Chief Justice says that Jamadar JA turns the reasoning of Lord Slynn on its head (para 55), suggesting that the fact that the LATT is a public body whose public utterances and actions shape and influence public feelings and opinions provides a basis in law for the LATT to conduct an investigation as the LATT cannot be a conduit pipe. The Chief Justice says the analysis in **Rees v Crane** is not a basis for inferring that the provision to the Commission with initial and further material amounted to and was in fact an investigation. The Chief Justice submits that the reasoning of Lord Slynn is no basis for inferring that the Board did not have in its contemplation the differing roles for each participant at each of the stages of the section 137 process or for inferring that from the silence of the Constitution as to process at each stage required an LATT investigation to ascertain the truth of the allegations.

[108] Further Jamadar JA reasoned at para 47⁸⁶ that the effect of the Chief Justice's position was that the Prime Minister or the Judicial and Legal Service Commission were reduced to being mere conduits without any obligation to be satisfied that there are bona fide questions to be investigated. That leads the learned judge of appeal to say, with respect illogically, that in order to determine whether that is so then they must carry out an investigation or an inquiry to determine that question. As he put it at paragraph 50⁸⁷ in order for complaints to be duly considered and assessed, consideration must be given to the materials needed to make such a decision, "thus an investigation". The Chief Justice says that Jamadar JA conflates the two functions of consideration and investigation.

[109] The first function is an evaluation exercise and the second function is a fact finding exercise. Thus to the extent that the Prime Minister is desirous of making a representation upon a complaint then he must be satisfied that the complaint has a prima facie sufficient basis in fact and is sufficiently serious to warrant representation to the President. It is vital that the Prime Minister does not trespass into the fact finding territory of the Tribunal of judges.

⁸⁶ R 3/1140

⁸⁷ R 3/1141

- [110] Yet Jamadar JA reasoned that such a trespass was desireable on the basis that on its face section 137 of the Constitution does not prohibit the Prime Minister or Judicial and Legal Service Commission or the LATT from carrying out “fair, careful and thorough...” antecedent investigations –see para 55 & 56⁸⁸ - into the allegations of misconduct against the Chief Justice before deciding whether to make a formal complaint to the Prime Minister.
- [111] Jamadar JA justified these “fair, careful and thorough...” investigations as being good for the Chief Justice and good for the court system as a whole and that it is in the public interest for the LATT to clear the Chief Justice if that be the case; the Chief Justice “...having attempted publicly to deny any wrongdoing on his part.”
- [112] In parantheses, whether the Chief Justice’s denials are comprehensive or do not count against him on the question of interpretation as they do not answer a question of legal interpretation.
- [113] First, the Chief Justice says that multiple investigations undermine the intent of section 137 of the Constitution to have a single authoritative investigation of the facts by a Tribunal that commands respect for its definiteness and impartiality.
- [114] Second, the Chief Justice says such multiple investigations by persons both within and without section 137 are not consistent with the intent and language of section 137 and the contextual provisions.
- [115] Third, the Chief Justice says that such an interpretation of the provisions subject the public and the Judiciary, not to mention the Chief Justice, to an attenuated and incoherent series of fact finding processes, each of which is made to appear identically entitled to determine the truth of the allegations and thus undermines judicial accountability and subverts judicial independence.
- [116] As for Bereaux JA, he correctly, it is submitted, at para 21⁸⁹, considered the power of the LATT against the background of section 137 of the Constitution. The learned Judge of Appeal however, was wrong not to consider the other provisions

⁸⁸ R 3/1143-44

⁸⁹ R 3/1092-3

cited above. In addition, Bereaux JA properly accepted that section 137 provides an exclusive⁹⁰ procedure to remove a Judge.

[117] At para 24 to 28⁹¹ Bereaux JA too cited **Rees v Crane**. The learned judge of appeal simply asserted that the exclusivity of that procedure under section 137 does not prohibit anyone from conducting their own investigation or enquiries. The learned judge of appeal referred quite properly to public rights and restrictions upon those rights. The Chief Justice says that the public's rights include judicial accountability being the province of those identified in the Constitution as under a duty to ascertain the truth of the allegations against the Chief Justice. More specifically in this case there has been no infringement upon the right of anyone including the LATT to comment upon and criticise the Chief Justice – freedom of expression and the press have been treated as sacrosanct.

[118] However, Bereaux JA went on, citing the Board's decision in **Sharma v Antoine** [2007] 1 WLR 780, to opine that section 137 does not prevent a police investigation into alleged criminal conduct.⁹²

[119] However, no question of section 137 preventing the police from discharging its duty arises. They go hand in hand. The correct position is that the Board determined in **Sharma** at para 14(1) that the rule of law meant that no one is above the law irrespective of the office they hold and that the holding of high office does not permit discrimination in the application of the criminal law. Further any criminal investigation by the police or other authorised body would of necessity be expressly authorised by statute or the common law as appropriate. In the extraordinary case of alleged criminal conduct by a judge, the proven conduct such as a conviction would be evidence of misbehaviour within the meaning of section 137 of the Constitution.

[120] Bereaux JA asserted that section 137 does not prohibit the use of information or material from a "private" investigation being sent to the Prime Minister. In so doing Bereaux wrongly conflates the investigation 'cart' with the complaint 'horse'. The fact that the LATT provided the Prime Minister with material or information

⁹⁰ R 3/1097

⁹¹ R 3/1097 - 1099

⁹² R 3/1097-8 para 25

that it had collated and “investigated” would not exempt the Prime Minister from evaluating such material or information before making a representation to the President, in order that the Tribunal may conduct an investigation.

[121] In order to be constitutionally efficacious, a section 137 process needs to adhere to the procedures that are consistent with its language, its history, its context and its intent. It is only then that such a process can command public confidence and reinforce the constitutional values of judicial independence and accountability and so support the Rule of Law and enhance the Administration of Justice.

[122] In short, any investigation into judicial misconduct for the purpose of removal require the clearest and unequivocal mandate as to whom shall be the investigator and how that investigation should be proceeded with. In other parts of the common law world all such ambiguity is resolved by rules and protocols prescribed and/or authorised by the legislature that either implicitly or explicitly invoke the constitutional values of judicial accountability and independence.

[123] Instead *Bereaux JA* at para 26⁹³ invoked the notion of a non-binding⁹⁴ investigation. It is with respect difficult to glean how that notion fits into the constitutional context of judicial accountability and independence. If the learned judge of appeal meant that ‘non-binding’ meant non-binding on the Chief Justice then, respectfully, the phrase is constitutionally meaningless.

[124] Every properly authorised investigation into judicial misconduct in the Commonwealth should meet the constitutional requirements of even-handedness, impartiality, due process and fairness – sections 4 & 5 of the Constitution identify these requirements. They must be observed. Their observance makes them binding upon the polity in that they command respect and support the rule of law and enhance judicial independence and accountability.

[125] Further the Chief Justice says that it is self-contradictory for *Bereaux JA* to assert that the LATT was not bound to disclose its mandate and its procedures and processes, nor to be bound to observe them by so informing the Chief Justice.

⁹³ **R 3/1098**

⁹⁴ Mendonca CJ also described at para 101 & 103 without analysis in this context the LATT investigation as non-binding **RA3/1064-5**

The LATT has not done this because there is nothing in the Constitution express or implied or the LPA that authorises the LATT to conduct or continue to conduct its investigation into the allegations against the Chief Justice.

[126] As to the immunity argument - see Bereaux JA para 28-29⁹⁵ - wrongly attributed to the Chief Justice, the Chief Justice's case is not that he and other Judges are not accountable or subject to scrutiny. They all are. His case is that no Judge should be subject to unlawful or unauthorised scrutiny.

Separation of Powers

[127] Further Mendonca CJ (Ag),⁹⁶ Jamadar JA ⁹⁷ Bereaux JA⁹⁸ had differing recourse to the doctrine of the separation of powers as seeking to protect the judiciary from encroachment by the other branches of government.

[128] Mendonca CJ (Ag) at para 64 concluded that the doctrine of the separation of powers was not directly relevant and so rejected the LATT's arguments on the point. The Chief Justice agrees.

[129] Jamadar JA's reasoning at para 60 to 64 was to the effect that the primary aim of the entrenchment of section 137 was to be considered in the context of the separation of powers, to avoid judicial immunity and enhance judicial accountability, and thus supported the notion that the LATT was not prohibited from conducting an investigation. The Chief Justice says the Learned Judge of Appeal conflates the doctrine inherent in the Westminster model with two further matters, the broader context of judicial independence and security of tenure, and the meaning of section 137 of the Constitution.

[130] Bereaux JA for his part accepted the LATT's submission that no useful purpose was to be served by invoking the doctrine of separation of powers as a means of inhibiting the public right of judicial scrutiny.

[131] For his part the Chief Justice accepts the summary of the doctrine of separation of powers derived from the Board's decisions in *Hinds v The Queen* [1997] AC

⁹⁵ R 3/1099

⁹⁶ R 3/1045-7

⁹⁷ R 3/1142 to 4

⁹⁸ R 3/1095 & 1098

195, 212- 3, Lady Hale in **Surratt v Attorney General of Trinidad and Tobago** [2008] 1 AC 655 para 12 to 22 and Lord Sumption in **Steve Ferguson et al v The Attorney General** [2016] UKPC 2 para 15.

[132] The Chief Justice says, with respect, that recourse to the doctrine of the separation of powers does not directly assist in the question of construing the sections of the Constitution that ensure accountability. The LATT is not relying upon legislation that impinges upon the judicial function, instead the LATT says that what is contained in section 137 of the Constitution is not relevant to its exercise of an investigation into the truth of allegations against the Chief Justice, in reliance on its obligations to support and promote the rule of law and the administration of justice. However, see Lord Diplock's dictum in *Hinds* at page 221, repeated by Lady Hale at para 22 of *Surratt*:

But more important, for this is the substance of the matter, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

[133] So here, any Judge faced with serious allegations faces the prospect of investigation by the LATT, deprived of the safeguards explicit and implicit within section 137 of the Constitution, and having those questions decided not by a Tribunal of his peers but by an ad hoc Committee of the LATT and then a complaint by the LATT.

Legal Profession Act ("LPA")

[134] The short point is whether there is anything in the LPA that indicates clearly and unequivocally that the LATT is empowered as a body created by statute to investigate a judge.

[135] The principles are uncontroversial that, as a body created by statute, the LATT's powers are circumscribed by the statute creating it: see **Attorney General v Great Eastern Railway Co** (1880) 5 App Case. 473; **Attorney General v**

Crawford Urban District Council [1962] Ch. 246; **Hazell v Hammersmith and Fulham London Borough Council** [1992] 2 AC 1.

[136] Section 5 (b) , (c), (f) and (g) provide:

“The purposes of the Association are—

- a) ...;*
- b) to represent and protect the interests of the legal profession in Trinidad and Tobago;*
- c) to protect and assist the public in Trinidad and Tobago in all matters relating to the law;*
- d) ...;*
- e) ...;*
- f) to promote, maintain and support the administration of justice and the rule of law;*
- g) to do such other things as are incidental or conducive to the achievement of the purposes set out at (a) to (f).”*

[137] In summary the Chief Justice’s case on section 5 of the LPA is that Parliament did not intend, in passing legislation for the fusion and the regulation of the legal profession, to empower the LATT to investigate and find facts in respect of the alleged misconduct of any High Court Judge or Chief Justice at all, whether the LATT is seeking to advance its own or another’s complaint⁹⁹ against the Chief Justice or any Supreme Court judge.

[138] The Chief Justice says that Kangaloo J was right to observe at paras 21¹⁰⁰ and 34 to 36¹⁰¹ that the decisions of the Board in **Meerabux** (supra) and **Re: Chief Justice of Gibraltar** [2010] 2 LRC 450 (PC) support the proposition that a Bar/Law Association or a group of Attorneys, a single Attorney, indeed any citizen of this country may complain about a judge or the Chief Justice. But these cases, including **Rees v Crane**, do not support the conclusion that section 5 of the LPA

⁹⁹ Rule 36(4) of the Third Schedule of the Legal Profession Act provides: *“Where there is ground for complaint against a Judge or magistrate an Attorney-at-law may make representation to the proper authorities and in such cases, the Attorney-at-law shall be protected.”*

¹⁰⁰ R 2/744

¹⁰¹ R 2/750-1

or Rule 36 empower the LATT to conduct an investigation or enquiry into the alleged misbaviour of the Chief Justice prior to making such a complaint.

[139] Mendonca CJ (Ag) at para 36 to 53¹⁰² found that section 5 of the Legal Profession Act provides the LATT with authority to conduct an investigation into allegations made against the Chief Justice. Mendonca CJ (Ag) reasoned that the allegations were of a serious nature and were therefore of concern to the LATT. This was so given the LATT's interest in promoting its interests and promoting the Rule of Law and the Administration of Justice.

[140] Mendonca CJ (Ag) reasoned that as section 5 (g) LPA was broad and flexible enough to allow for incidental purposes of making a representation or complaint to the Prime Minister, then that meant that the LATT was not excluded from conducting an investigation into the allegations. Mendonca CJ (Ag) cited Lord Hope in –see in **Meerabux v AG of Belize** [2005] UKPC 12 where he observed that:

“So it must also have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal that was convened to inquire into the matter under section 98(5)(b). This is a powerful, and in their Lordships’ opinion a conclusive indication that in this context mere membership of the Association is not to be taken, in itself, as a ground of disqualification in the case of the Chairman.”

[141] The Chief Justice says that **Meerabux** is not therefore authority for the proposition that under section 5 the LATT has the power to examine and make findings on whether the allegations against the Chief Justice are substantiated. Lord Hope went no further than observing that the professional body can be expected to be involved in the impeachment proceedings. Lord Hope had no ground for saying that the professional body would take over those proceedings with a view to making a complaint to the Prime Minister. Indeed this is accepted

¹⁰² R 3/1033-41

by the LATT in its letter dated 20th January 2018¹⁰³: “.... We do consider however that, as with any other citizen, we have the power to refer a complaint to the Prime Minister for him to treat with as he deems fit and we are satisfied that the power to refer such a complaint falls within our statutory mandate...”

[142] First, the Chief Justice does not dispute that the LATT is entitled to complain to the Prime Minister but it does not need to rely on section 5 for that purpose.

[143] Second, Mendonca CJ (Ag) did not address himself to the precise language of the LATT’s investigation which was to “attempt to ascertain/substantiate the facts” on which allegations are based; to “determine whether they are true or not”; and if they are true, to “hold the CJ accountable”.

[144] Third, the Chief Justice says that that there are no express or detailed provisions, protections or other safeguards within the LPA that support Mendonca CJ (Ag)’s conclusion that if one can complain there is no reason why one cannot investigate, and that the LATT has a legislatively mandated role in the investigating of allegations against the Chief Justice. Indeed Mendonca CJ (Ag) does not identify any in his judgment.

[145] Fourth, Mendonca CJ (Ag) did not address the wider context of the LPA and declined to construe it in its broader context. In so doing he misconstrued the submission about the LPA’s long title,¹⁰⁴ which was about identifying the core purpose of the LPA to test the LATT’s argument. Instead Mendonca CJ (Ag)’s reasoning did not advert to the fact that that, across its provisions, the LPA sets out the criteria for admission for all Attorneys-at-Law to practice and the Court regulates the admission of all Attorneys-at-Law to practise - section 15 LPA.¹⁰⁵ Mendonca CJ (Ag) overlooked the provisions by which the Chief Justice appoints¹⁰⁶ the members of the Disciplinary Committee after consultation with the

¹⁰³ See IA 9 R 1/58

¹⁰⁴ RA 3/1040

¹⁰⁵ 15. (1) Subject to this Act a person who makes application to the High Court and satisfies the Court that he—(a) is a Commonwealth citizen or a Caricom national; (b) is of good character, and either (c) holds the qualifications prescribed by law, or (d) is a person in respect of whom an Order has been made under section 15A, shall be eligible to be admitted by the Court to practise as an Attorney-at-law in Trinidad and Tobago.

¹⁰⁶ Fourth Schedule Disciplinary Committee 1. (1) The Disciplinary Committee shall consist of the President of the Association and fifteen other persons appointed by the Chief Justice after consultation with the Council. (2) The appointed members shall include three members of the Council.

Council, except the President who is ex officio a member of the Disciplinary Committee in accordance with the Code of Ethics.¹⁰⁷

[146] Fifth, Mendonca CJ (Ag) is wrong to suggest that, if there is no power to investigate, then all that is left for LATT is a passive role in respect of the complaints against the Chief Justice. The most that is expected of the LATT is support for and endorsement of the section 137 processes so as assure confidence in the administration of justice. Contrary to his assertion at paragraph 45 the LATT's position is not about defending the Chief Justice or prosecuting him but upholding at every juncture the Rule of Law which in this case requires adherence to the section 137 process and not recourse to an invented process outside of the Constitution or the LPA.

[147] Sixth, Mendonca CJ (Ag) at paragraph 51 relies upon the so called *Tameside* duty (***Secretary of State for Education v Tameside MBC*** [1977] AC 1014) which is the obligation on the decision-maker to acquaint itself with all the relevant material. That duty does not provide a power to the LATT which it otherwise does not possess in law. This argument assumes what it seeks to prove.

[148] As for Jamadar JA, he reasoned at para 12 to 39¹⁰⁸ that the LPA provided the LATT with a power to determine whether the Chief Justice has "...misconducted himself in office.." (para 26) having observed (para 14) that "...there has been no clear resolution as to truth or falsity, credibility or otherwise..." and these allegations are serious and only partially answered (para 14 & 16) and thus "determining whether they are true or not" is within section 5 (b), (c) and (f) of the LPA. Further Jamadar JA relied on the Judiciary's Statement of Principle and Guidelines for Judicial Conduct as establishing, and given the Rule of Law that such an investigation is within and incidental to the purposes of section 5 and Rule 36 of the Code of Ethics. Jamadar JA concludes that no authority is required

(3) Subject to subparagraph (4) the other appointed members shall be Attorneys-at-law of not less than ten years standing. (4) The Chairman and Vice-Chairman of the Committee shall be appointed by the Chief Justice after consultation with the Council and shall be members who have held high judicial office or, are Attorneys-at-law of not less than ten years standing.

¹⁰⁷ Section 35 of the LPA

¹⁰⁸ R 3/1124 - 1137

for the proposition that the LATT ought to conduct a careful and fair investigation for the purpose of supporting or holding the Chief Justice accountable and he too relies upon the so called **Tameside** duty.

[149] As for Bereaux JA, he reasoned at paras 34 to 47 that the serious allegations made against the Chief Justice entitled the LATT “to intervene”.¹⁰⁹ While Bereaux JA correctly observed at para 34 and 39¹¹⁰ that the powers of the LPA deal with the regulation of the legal profession and not the investigation of a judge, he does not revert to that theme for the rest of his analysis.

[150] The Chief Justice says that had he done so he would have come to the opposite conclusion. Further Bereaux JA says, without basis, that section 5 LPA is independent and stands on its own without context. The core of his reasoning is that the allegations required a response and since the Chief Justice’s response was tepid it fell to the LATT to investigate them. The Chief Justice says that is not a basis for determining in law the vires of conduct of the LATT.

[151] The Chief Justice says further that both Jamadar JA and Bereaux JA’s respective reasoning eschew the specific context of the LPA and that the six criticisms of Mendonca’s reasoning at paragraphs 128 to 134 above are applicable to all three Judges of Appeal.

[152] The Chief Justice says that Bereaux JA too was right to say at para 46, with Kanagloo J (see para 125 above) that **Meerabux** (supra) and **Re: Chief Justice of Gibraltar** [2010] 2 LRC 450 (PC) turned on their own facts and did not show any entitlement and obligation on the part of the profession to conduct an enquiry and/or investigation into a Judge or Chief justice with the potential aim of having such Judge or Chief Justice removed from office.

Apparent Bias

[153] Kangaloo J decided at para 37 that the LATT was bound to comply with the obligations in respect of apparent bias- see **Porter v Magill** [2002] AC 357 (and applied by the local Court of Appeal in **Panday v Virgil** Mag. App No. 75 of 2006)

¹⁰⁹ R 3/1108

¹¹⁰ R 3/1101

but that the LATT's conduct had not been tainted by apparent bias when carrying out its investigation.

[154] Mendonca CJ (Ag) at para 88 to 114¹¹¹ found that:

- a) apparent bias did not apply to the LATT's investigation - see para 99-103;¹¹²
- b) in any event given all of the facts apparent bias was not made out.

[155] Jamadar JA reasoned in a similar manner as Mendonca CJ(Ag) above – that the strictures as to apparent bias and natural justice did not apply to the LATT – para 93 to 98;¹¹³ on the facts that the allegation of apparent bias failed- para 74 to 97;¹¹⁴ and that the allegation of bad faith also failed - para 99 to 102.¹¹⁵

[156] The Chief Justice says that the Court of Appeal was wrong to conclude that apparent bias did not apply at all to the LATT's investigation. Mendonca CJ (Ag) was simply wrong to say that *Porter v Magill* was about what a judge decides – para 99; the case concerned an auditor. The case is about principle and applies to any decision maker.

[157] The Chief Justice says further that as to the Motion of No Confidence, the fair-minded and informed observer would appreciate that, while the motion was in relation to an earlier issue, the fact is that the LATT had publicly declared that it had no confidence in the Chief Justice and in his inability to hold the office as Chief Justice. The Chief Justice says that Mendonca CJ (Ag) gave insufficient weight to this –see para 105 to 114.

[158] Further, the Chief Justice says that Kangaloo J and Mendonca CJ (Ag) did not have sufficient regard to the LATT's public statement dated 14 December

¹¹¹ R 3/ 1058-1071

¹¹² R 3 1064-5

¹¹³ R 3/1158-61

¹¹⁴ R 3/ 1150-8

¹¹⁵ R 3/1161-2

2017¹¹⁶, that the Chief Justice's silence was "unacceptable and incomprehensible"; his failure to challenge the allegations had the potential to "irreparably bring the Office of the Chief Justice into disrepute and by extension, tarnish the entire Judiciary"; and his continued silence was "nothing short of reckless".

[159] The Chief Justice says that Kangaloo J should have and was wrong not to have done so given her observations -see para 29 & 30 ¹¹⁷:

This Court is therefore entitled to ask itself, what was the intention of the Law Association in expending the time and effort and perhaps costs in appointing a Committee, of which the President of the Law Association was President, investigating these allegations, by providing information to the press by way of updates on the Committee's work and in answer to specific questions put to the President of the Law Association and the Committee by the newspapers?

The Court also asks itself, as was an issue in the Meerabux case, what was the necessity for the President of the Law Association to also be the President or indeed even a member of the Committee to ascertain/substantiate the allegations against the Honourable Chief Justice?

[160] The Chief Justice says that Mendonca CJ (Ag) failed to have regard to the fact that the LATT was putting its charges to the Chief Justice by letter dated 20 January 2018, and was undertaking the fact finding to determine whether the Chief Justice was guilty. In other words, the complainant who wrote to the Chief Justice and the public spokesman and the decider of facts were all the same. Mendonca CJ (Ag) was wrong to distinguish **Meerabux**. The LATT's public statements in the course of its investigation made apparent bias more likely: **Locabail (UK) Ltd v Bayfield Properties** [2000] QB 451 para 25. Further Mendonca CJ (Ag) does not mention these matters at para 110-112.

¹¹⁶ R 1/43

¹¹⁷ R 2/748-9

Failure to provide safeguards

[161] The LATT's investigation has been carried out unfairly and contrary to natural justice and is otherwise lacking in appropriate and effective procedural safeguards by reason of its failure and refusal to provide the Chief Justice with its procedures for its purported investigation and all the material of its Investigating Committee and a copy of the Committee's interim and/or final report and then opportunity to comment on all of the above.

[162] The facts are that over the period 30 November 2017 to 20 January 2018 (IA 9¹¹⁸) of its purported investigation to determine the truth or falsity of the said allegations and/or the Chief Justice's guilt or innocence of them, the LATT failed and refused to disclose to the Chief Justice its processes or procedures adopted or disclose any reports.¹¹⁹

[163] Further the only material disclosed was in response to the Chief Justice's request dated 31 January 2018 for copies of any documents, photographs and WhatsApp messages as their authenticity had been disputed. The LATT responded on 6 February 2018, attaching copies of WhatsApp messages and documents. By letter dated 14 February 2018¹²⁰, the Chief Justice's attorneys complained that the LATT's previous withholding of the package of documents, statements and annexures, was "plainly wrong, unfair and unacceptable." The Chief Justice cited Lord Brown in ***Permanent Secretary, Ministry of Foreign Affairs v Feroza Ramjohn*** [2011] UKPC 20 para 39 as supporting the LATT's duty to provide the material to the Chief Justice.

[164] Mendonca CJ (Ag) at para 117 to 130 reasoned that fairness in the context did not require the LATT to provide the Chief Justice with the material in accordance with ***R v Secretary of State for the Home Department, ex p. Doody*** [1994] AC 531 and ***Rees v Crane*** since all the LATT was and is doing is to inform itself before deciding to make a complaint. Jamadar JA at para 93 to 98¹²¹ and Bereaux JA at para 53 to 66¹²² came to similar conclusions.

¹¹⁸ R 1/35/12

¹¹⁹ R 1/25/22

¹²⁰ R 1/36/15 & 1/69 to 70 & 2/512 & 545 to 585

¹²¹ R 3/1158 to 1161

¹²² R 3/ 1111 to 1116

[165] The Chief Justice says that this is a misdescription of the impact and significance of the LATT's investigation, which directly affects the Judiciary and the Chief Justice's reputation and public confidence in the administration of justice.

[166] Further, Mendonca CJ (Ag) simply does not deal with the fact of the non-disclosure of the report to the Chief Justice. Nor do Jamadar and Bereaux JJA. The Chief Justice relies upon **Doody** and **Rees v Crane** to ground the obligation to disclose them to the Chief Justice. The Chief Justice says this reasoning failed to have regard to the fact here the LATT putting its charges to the Chief Justice by letter dated 20 January 2018 and was undertaking the fact finding it says it was entitled to determine whether the Chief Justice was guilty.

DISPOSITION

[167] For all the above reasons, it is submitted that the Appellants' appeal should be allowed.

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9 July 2018

**IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL ON APPEAL FROM THE
COURT OF APPEAL OF THE REPUBLIC
OF TRINIDAD AND TOBAGO**

BETWEEN:

**THE HONOURABLE THE CHIEF JUSTICE OF
TRINIDAD AND TOBAGO**

MR. JUSTICE IVOR ARCHIE O.R.T.T.

Appellant

-V-

**THE LAW ASSOCIATION OF TRINIDAD AND
TOBAGO**

Respondent

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